

**A Ketua Polis Daerah Shah Alam & Ors v Nor Azura bt Amzah
(administrator for the estate of Aminulrashid bin Amzah,
deceased) & Anor and another appeal**

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS
B-01(NCVC)(W)-117-04 OF 2016 AND B-02(NCVC)(W)-866-05 OF
2016
ZAWAWI SALLEH, VERNON ONG AND ASMABI MOHAMAD JJCA
C 5 DECEMBER 2017

*Civil Law Act — Application — Death cause by fatal gunshot wound
— Whether police personnel liable — Whether firing fatal shot was unwarranted
D — Whether award of damages for tort of misfeasance should be allowed
— Whether plaintiff entitled to claim for pain and suffering — Whether amount
awarded as general damages was manifestly excessive — Whether appropriate to
grant aggravated/exemplary damages — Civil Law Act 1956 ss 7 & 8*

E On 26 April 2010, one Aminulrasyid bin Amzah ('the deceased') was shot dead
by police personnel, including one Koperal Jenain Subi ('the first defendant').
The deceased was driving his sister's car along Jalan Tarian 11/2 at the material
time when he suffered the fatal gunshot wound allegedly inflicted upon him by
the first defendant. The police personnel claimed that the deceased had failed
F to stop the car when he was instructed, which led the police to surmise that the
deceased was speeding to evade arrest. The police also submitted that it was
while they were in hot pursuit of the deceased who was driving in a dangerous
and aggressive way that the fatal gunshot was fired. Nor Azura bt Amzah and
Norsiah bt Mohamad ('the plaintiffs/respondents') were the joint
G administratrix of the deceased under s 8 of the Civil Law Act 1956. The
plaintiffs/respondents commenced legal proceedings against the first
defendant for the death of the deceased and the Ketua Polis Daerah Shah Alam
(the second defendant) and the other defendants for being vicariously liable
for the acts of the first defendant and other police personnel. They also sued the
H second defendant for misfeasance in public office. The defendants denied
liability for any injury and suffering of the deceased on the grounds that the
first defendant and other police personnel had acted reasonably and according
to correct procedure. After a full trial of the action, the trial judge allowed the
plaintiffs' claim. In assessing damages, the High Court awarded the plaintiffs
I general damages of RM150,000, damages of RM150,000 for misfeasance,
RM150,000 for aggravated/exemplary damages, RM10,000 for bereavement,
and RM4,800 for special damages with costs of RM50,000. The first
defendant and the other defendants lodged their respective appeals against the
decision of the High Court. In respect of liability, the first defendant argued

that there was no evidence to show that he had discharged the fatal shots and that even if there was, in all the circumstances the first defendant's conduct was justified and reasonable because of the manner in which the deceased reacted and behaved. In respect of liability the defendants argued that liability should be apportioned on the basis of 75% against the deceased and 25% against the first defendant. As for the claim of misfeasance in public office, it was contended that this claim was unfounded as the three ingredients of the tort had not been pleaded or proved by the plaintiffs/respondents. It was also submitted by the defendants that the trial judge had erred in awarding aggravated or exemplary damages. In reply the plaintiffs/respondents submitted that it was settled law that a police officer should only open fire when he is under attack or believes that his life is in danger. In the present case, the evidence clearly showed that at the time the fatal shot was fired, the deceased posed no threat to the police personnel.

Held, allowing the appeal in part with no order as to costs for this proceeding:

- (1) The trial judge was correct in his findings that at the material time the deceased did not pose any threat to the police personnel. On the totality of the evidence, the action of the first defendant in firing the fatal shot, which resulted in the death of the deceased was clearly unwarranted, unreasonable and unjustified. Further, contributory negligence was not a defence in this instance (see paras 10–11).
- (2) In regard to the tort of misfeasance in public office, based on the facts the plaintiffs had neither pleaded nor proved this tort. Consequently, the award of RM150,000 for the tort of misfeasance in public office was set aside (see paras 12–13).
- (3) As for the award of general damages for pain and suffering, the plaintiffs had failed to prove the damages for pain and suffering under this head of damages. Similarly, there was no evidence to show that the second plaintiff depended on the deceased for sustenance. As such, the dependency claim was unsustainable. In the circumstances the RM150,000 awarded by the High Court as general damages was manifestly excessive and RM100,000 would be a more reasonable and fair amount. Accordingly, the amount of general damages ought to be reduced to RM100,000 (see para 13).
- (4) The awards for special damages and bereavement by the trial judge were affirmed. However, as there was an affirmative finding by the trial judge that there was no intention on the part of the first defendant, it was not appropriate to grant aggravated or exemplary damages. Accordingly, the award of RM150,000 for aggravated/exemplary damages was set aside (see paras 13–14).

A [Bahasa Malaysia summary]

- Pada 26 April 2010, seorang yang bernama Aminulrasyid bin Amzah ('si mati') ditembak mati oleh pegawai polis, termasuk seorang Koperal Jenain Subi ('defendan pertama'). Si mati memandu kereta kakaknya di Jalan Tarian 11/2 pada masa material apabila dia mengalami luka tembakan maut yang didakwa dikenakan kepadanya oleh defendan pertama. Pegawai polis mendakwa bahawa si mati telah gagal untuk memberhentikan kereta tersebut apabila dia diarah berbuat sedemikian, yang membawa kepada pihak polis mengagak bahawa si mati membawa kereta dengan laju untuk mengelak tangkapan.
- B** Pihak polis juga berhujah bahawa ia mengambil masa yang lama juga untuk mereka kejar memburu si mati yang memandu dengan cara berbahaya dan agresif yang membuatkan tembakan maut tersebut dilepaskan. Nor Azura bt Amzah and Norsiah bt Mohamad ('plaintif-plaintif/responden-responden') adalah pentabir wanita bersama si mati di bawah s 8 Akta Undang-Undang
- C** Sivil 1956. Plaintif-plaintif/responden-responden memulakan prosiding undang-undang terhadap defendan pertama untuk kematian si mati dan Ketua Polis Daerah Shah Alam ('defendan kedua') dan defendan-defendan lain kerana secara vikarius bertanggungjawab untuk tindakan-tindakan defendan pertama dan pegawai polis yang satu lagi. Mereka juga menyaman defendan
- D** kedua untuk misfeasans di pejabat awam. Defendan-defendan menafikan liabiliti untuk apa-apa kecederaan dan penderitaan si mati atas alasan bahawa defendan pertama dan pegawai polis yang satu lagi telah bertindak secara munasabah dan mengikut prosedur betul. Selepas perbicaraan penuh tindakan, hakim perbicaraan membenarkan tuntutan plaintif-plaintif. Dalam
- E** menaksirkan ganti rugi, Mahkamah Tinggi mengawardkan plaintif-plaintif ganti rugi am sejumlah RM150,000 untuk misfeasans, RM150,000 untuk ganti rugi tambahan/teladan, RM10,000 untuk kematian, dan RM4,800 untuk ganti rugi khas dengan kos sebanyak RM50,000. Defendan pertama and defendan-defendan lain memasukkan rayuan mereka masing-masing
- F** terhadap keputusan Mahkamah Tinggi. Berkaitan liabiliti, defendan pertama berhujah bahawa tidak terdapat keterangan untuk menunjukkan bahawa dia telah melepaskan tembakan maut dan walaupun jika terdapat, dalam kesemua keadaan tingkah laku defendan pertama adalah berjustifikasi dan munasabah kerana cara di mana si mati bertindak balas dan berkelakuan. Berkaitan liabiliti
- G** defendan-defendan berhujah bahawa liabiliti patut dibahagikan atas dasar 75% terhadap si mati dan 25% terhadap defendan pertama. Terhadap tuntutan misfeasans di pejabat awam. Ia diujahkan bahawa tuntutan ini adalah tidak berasas memandangkan tiga asas tort tidak diplidkan atau
- H** dibuktikan oleh oleh plaintif-plaintif/responden-responden. Ia juga diujahkan oleh defendan-defendan bahawa hakim perbicaraan telah terkhilaf dalam menegawardkan ganti rugi tambahan atau teladan. Dalam menjawab, plaintif-plaintif/responden-responden berhujah bahawa ia adalah undang-undang yang ditetapkan bahawa pegawai polis patut hanya melepaskan tembakan apabila dia diserang atau percaya bahawa nyawa berada
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dalam bahaya. Dalam kes ini, keterangan jelas menunjukkan bahawa pada masa tembakan maut tersebut dilepaskan, si mati tidak memberikan ancaman kepada pegawai polis.

Diputuskan, membenarkan sebahagian rayuan tanpa perintah terhadap kos untuk prosiding ini:

- (1) Hakim perbicaraan adalah betul dalam dapatannya bahawa pada masa material si mati tidak memberikan apa-apa ancaman kepada pegawai polis. Atas keseluruhan keterangan, tindakan defendan pertama dalam melepaskan tembakan maut, yang mana mengakibatkan kematian si mati jelas tidak wajar, tidak munasabah dan tidak berjustifikasi. Selanjutnya, kecuaiannya bersama bukan pembelaan dalam kes ini (lihat perenggan 10–11).
- (2) Berkaitan tort misfeasans di pejabat awam, berdasarkan fakta, plaintif-plaintif tidak memplid ataupun membuktikan tort ini. Akibatnya, award RM150,000 untuk tort misfeasans di pejabat awam diketepikan (lihat perenggan 12–13).
- (3) Terhadap award ganti rugi am untuk kesakitan dan penderitaan, plaintif-plaintif telah gagal untuk membuktikan untuk kesakitan dan penderitaan di bawah kepala ganti rugi ini. Sama juga, tidak terdapat keterangan untuk menunjukkan bahawa plaintif kedua bergantung kepada si mati untuk makanan. Dengan itu, tuntutan pergantungan tidak dapat dipertahankan. Dalam keadaan RM150,000 yang diawardkan oleh Mahkamah Tinggi sebagai ganti rugi am adalah jelas berlebihan dan RM100,000 akan menjadi lebih munasabah dan jumlah yang adil. Dengan itu, jumlah ganti rugi am patut dikurangkan kepada RM100,000 (lihat perenggan 13).
- (4) Award untuk ganti rugi khas dan kematian oleh hakim perbicaraan adalah disahkan. Walau bagaimanapun, memandangkan terdapat dapatan sah oleh hakim perbicaraan bahawa tidak terdapat niat oleh defendan pertama, ia tidak wajar untuk memberikan ganti rugi tambahan atau teladan. Dengan itu, award RM150,000 untuk ganti rugi tambahan/teladan diketepikan (lihat perenggan 13–14).]

Notes

For cases on application in general, see 1(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4561–4569.

Cases referred to

Cassell & Co Ltd v Broome and another [1972] AC 1027, HL (refd)
Co-operative Group (CWS) Ltd v Pritchard [2012] 1 All ER 205, CA (refd)
Ketua Setiausaha Kementerian Dalam Negeri dan lain-lain lwn Ghaur Chandram all Murugesu (mendakwa bagi pihak diri sendiri dan kesemua orang

- A** *tanggungan sebagai bakal pentadbir sah harta pusaka Uthayachandran a/l Ghaur Chandram) dan satu lagi rayuan* [2016] MLJU 1716; [2016] 3 CLJ 210, CA (refd)
Mariayee & Anor v Mohamed Nasir & Anor [1985] 1 MLJ 427; [1985] 1 CLJ 416, SC (refd)
- B** *N Indra a/p Nallathamby (administratrix of the estate and dependant of Kugan a/l Ananthan, deceased) v Datuk Seri Khalid bin Abu Bakar & Ors* [2014] 8 MLJ 625; [2013] 6 CLJ 272, HC (refd)
Rookes v Barnard [1964] AC 1129, HL (refd)
Thompson v Commissioner of Police of the Metropolis; Hsu v Commissioner of Police of the Metropolis [1997] 2 All ER 762; [1998] 1 QB 498, CA (refd)
- C** *Three Rivers District Council and others v Bank of England* [2000] 3 All ER 1, HL (refd)

Legislation referred to

- D** Civil Law Act 1956 ss 7, 8
Criminal Procedure Code s 15(3)

Appeal from: Civil Suit No 21 NcVC-38-04 of 2013 (High Court, Shah Alam)

- E** *Normastura bt Ayub (Nurhasmanita bt Abdul Manap with her) (Senior Federal Counsel, Attorney General's Chambers) in Civil Appeal No B-01(NCVC)(W)-117-04 of 2016 for the appellant.*
Zulkepli bin Omar (Lainah Yaacob & Zulkepli) in Civil Appeal No B-02(NCVC)(W)-866-05 of 2016 for the appellant.
- F** *N Surendran (Latheefa Koya and Shahid Adli Kamaruddin with him) (Daim & Gamany) in Civil Appeal Nos B-01(NCVC)(W)-117-04 of 2016 and B-02(NCVC)(W)-866-05 of 2016 for the respondents.*

G Vernon Ong JCA:

INTRODUCTION

- H** [1] The appeals herein emanate from the decision of the High Court at Shah Alam on a claim for assault and battery and alternatively negligence and public misfeasance, arising from fatal gunshot wounds inflicted upon Aminulrasyid bin Amzah ('the deceased') by police personnel, including the first defendant, in an incident that occurred on 26 April 2010.
- I** [2] The first and second plaintiffs sued as the joint administratrix of the deceased under s 8 of the Civil Law Act 1956 ('the CLA 1956') and the second plaintiff, as a dependent of the deceased under s 7 of the CLA 1956 for the death of the deceased. The second to the fifth defendants are sued for being vicariously liable for the acts of the first defendant and other police personnel;

the second defendant being also sued for misfeasance in public office.

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[3] The defendants deny liability for any injury and suffering of the deceased on the ground that the first defendant and other police personnel acted reasonably and according to correct procedure.

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[4] After a full trial of the action, the learned judge allowed the plaintiffs' claim and awarded the following heads of damages:

- (a) RM150,000 for general damages;
- (b) RM150,000 for damages for misfeasance;
- (c) RM150,000 for aggravated/exemplary damages;
- (d) RM10,000 for bereavement;
- (e) RM4,800 for special damages; and
- (f) RM50,000 costs.

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[5] The first defendant and the second to fifth defendants being dissatisfied with the decision of the High Court have lodged their respective appeals against the finding of liability and on damages. In this judgment, the parties shall be referred to as they were in the court below.

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SALIENT FACTS

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[6] The background facts have been comprehensively set out in paras 11–16 of the written judgment of the learned judge. Insofar as this appeal is concerned, it is sufficient to allude to the following key facts. The fatal shots were discharged in the course of a car chase by the police personnel. The deceased, then of 14 years of age, was driving his sister's car and in the front passenger seat was his friend one Mohd Azamuddin (SP4). Two of the police personnel discharged their firearms at the vehicle driven by the deceased. The deceased died of a gunshot wound to the back of his head.

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SUBMISSION OF COUNSEL

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[7] Learned senior federal counsel ('SFC') for the first defendant advanced six main points. First, learned SFC argued that there is no evidence to show that the first defendant discharged the fatal shots. Second, she argued that even if there is, in all the circumstances the first defendant's conduct was justified and reasonable. Third, there was contributory negligence on the part of the deceased; in particular: (i) the deceased failed to stop the car when he was instructed by the police; (ii) the deceased's car was speeding to evade arrest; (iii) as the police personnel suspected the deceased of being a criminal, there

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- A was a 'hot pursuit' after the deceased's car failed to stop and was driven in an aggressive and dangerous manner; and (iv) the deceased exposed himself, his passenger and other road users in a dangerous situation. Learned SFC submitted that liability should be apportioned on the basis of 75% against the deceased and 25% against the first defendant. Fourth, learned SFC argued that
- B the claim of misfeasance in public office against the third defendant (then the Chief Police Officer of Selangor) is unfounded as the three ingredients of the tort have not been pleaded or proved (*Three Rivers District Council and others v Bank of England* [2000] 3 All ER 1 (HL)). The facts relied on by the plaintiffs relate to defamation and not to the tort of misfeasance in public office. Fifthly,
- C it was contended that damages for pain and suffering should not have been allowed. The plaintiffs did not prove that they were suffering from any recognisable psychiatric illness due to the death of the deceased. Lastly, learned SFC argued that learned judge had erred in awarding aggravated or exemplary
- D damages on the ground that the third defendant's press statement about the deceased was malicious. Award of aggravated or exemplary damages are only awarded for injured feelings or for humiliating circumstances (*Cassell & Co Ltd v Broome and another* [1972] AC 1027 at p 1224; *Thompson v Commissioner of Police of the Metropolis*; *Hsu v Commissioner of Police of the Metropolis* [1997] 2
- E All ER 762; [1998] 1 QB 498 at p 516). There was also no evidence to show that the third defendant's press statement was oppressive, arbitrary or unconstitutional (*Rookes v Barnard* [1964] AC 1129).

- [8] In reply, learned counsel for the plaintiffs submitted that only two
- F persons fired the shots, ie the first defendant and SD4. However, SD4 did not fire any shots after Bulatan Kayangan. Therefore, only the first defendant could have fired the fatal shot which killed the deceased. There was no justification for the first defendant to have fired the shots because the Inspector General's Standing Orders ('IGSO') and s 15(3) of the Criminal Procedure Code clearly
- G provides that shots cannot be fired unless the police officer finds himself in a situation where he is under attack and he believes that his life is in danger or under threat of grievous injury. The evidence clearly showed that at the time the fatal shot was fired, the deceased posed no threat to the police personnel. Learned counsel also argued that contributory negligence is not a defence in
- H cases of assault and battery (*Co-operative Group (CWS) Ltd v Pritchard* [2012] 1 All ER 205 at p 222 (CA)). Further, it was submitted that all the ingredients in the tort of misfeasance have been pleaded in the statement of claim. All the necessary facts have been proved to satisfy the three ingredients of the tort of misfeasance in public office. The third defendant never retracted his statement
- I and did not come to court to explain or clarify.

[9] As for damages for pain and suffering, learned counsel submitted that the estate claim was made under ss 7 and 8 of the CLA 1956 and that RM150,000 is a fair and reasonable sum in the circumstances. The plaintiffs

were entitled to aggravated and exemplary damages because of the oppressive and arbitrary actions of the defendants (*N Indra a/p Nallathamby (administratrix of the estate and dependant of Kugan a/l Ananthan, deceased) v Datuk Seri Khalid bin Abu Bakar & Ors* [2014] 8 MLJ 625; [2013] 6 CLJ 272 (CA); *Rookes v Barnard*).

DECISION

[10] We agree with the learned judge's findings that: (i) there was no evidence that there were other road users in Jalan Tarian 11/2 at the material time; (ii) that Jalan Tarian 11/2 is a housing area; and (iii) that during the time of the shooting, it was early hours of the morning and the area was empty and quiet. Based on the evidence on record, the deceased was driving his car away from the police when the first defendant fired the fatal shot. Further, by the time the deceased's car arrived in the housing area of Jalan Tarian 11/2, the car tyres were already punctured. More significantly, the first defendant admitted under cross-examination that the deceased posed no danger at the time he fired the fatal shot. As such, we agree with the learned judge's finding that the deceased did not pose any threat to the police personnel.

[11] We also note that when the first defendant fired his weapon, the weapon was set on auto mode instead of manual mode; consequently, 21 bullets were discharged in the direction of the deceased's car. The fact that the first defendant fired the fatal shot is undisputed; he admitted that his patrol car was behind the deceased's car and pursuing it when the shots were fired. The first defendant candidly admitted that it was wrong for him to have done that. In our view, this is a patent instance of negligence on the part of the first defendant. On the totality of the evidence, the action of the first defendant in firing the fatal shot which resulted in the death of the deceased was clearly unwarranted, unreasonable and unjustified. As for the defendant's argument of contributory negligence, we agree with the submission of learned counsel for the plaintiffs that contributory negligence is not a defence in this instance.

[12] In regard to the tort of misfeasance in public office, however, we agree with the submission of learned SFC that on the pleaded case and on the facts the plaintiffs have not proved the tort of misfeasance in public office.

[13] As for the award of general damages for pain and suffering, we also agree with learned SFC that the plaintiffs have failed to prove the damages for pain and suffering under this head of damages. Similarly, as there is no evidence to show that the second plaintiff depended on the deceased for sustenance the dependency claim is unsustainable (see *Ketua Setiausaha Kementerian Dalam Negeri dan lain-lain lwn Ghaur Chandram a/l Murugesu (mendakwa bagi pihak diri sendiri dan kesemua orang tanggungan sebagai bakal pentadbir sah harta*

- A *pusaka Uthayachandran a/l Ghaur Chandram) dan satu lagi rayuan* [2016] MLJU 1716; [2016] 3 CLJ 210 (CA) which referred to *Mariayee & Anor v Mohamed Nasir & Anor* [1985] 1 MLJ 427; [1985] 1 CLJ 416 (FC)). For general damages, however, we take the view that RM150,000 is manifestly excessive and that RM100,000 is a more reasonable and fair amount in the
- B circumstances. Accordingly, we would reduce the amount of general damages to RM100,000. We affirm the awards for special damages and bereavement by the learned judge. Consequent on our decision in para [11] preceding, the award of RM150,000 for the tort of misfeasance in public office is set aside.
- C [14] As there was an affirmative finding by the learned judge that there was no intention on the part of the first defendant, we do not think that it is appropriate to grant aggravated or exemplary damages. Accordingly, the award of RM150,000 for aggravated/exemplary damages is also set aside.
- D [15] In conclusion, the defendants' appeals are allowed in part. We make no order as to costs in this proceedings. The costs of the High Court are maintained.
- E *Appeal allowed in part with no order as to costs for this proceeding.*

Reported by Kohila Nesan

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